Nos. 02-241, 02-516

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IN THE

Supreme Court of the United States

BARBARA GRUTTER,

Petitioner,

-and-

JENNIFER GRATZ and PATRICK HAMACHER,

Petitioners,

v.

LEE BOLLINGER, *et al.*,

Respondents.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF THE STATES OF MARYLAND, NEW YORK, ARIZONA, CALIFORNIA, COLORADO, CONNECTICUT, ILLINOIS, IOWA, MAINE, MASSACHUSETTS, MINNESOTA, MONTANA, NEW MEXICO, NORTH CAROLINA, OKLAHOMA, OREGON, RHODE ISLAND, VERMONT, WASHINGTON, WEST VIRGINIA, WISCONSIN, AND THE TERRITORY OF THE U.S. VIRGIN ISLANDS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*

The *Amici States* respectfully submit this brief in support of Respondents University of Michigan, *et al.* At issue is the States' discretion to determine how best to provide high-quality public education — "perhaps the most important function of state and local governments." *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954).

Every State in the nation operates a system of higher education — from California and Texas, with 143 and 109 public institutions of higher learning, respectively, to Alaska and Delaware, which each have five.[1] States provide a complete array of post-secondary schools, including two-year community colleges, four-year colleges and universities, research and doctoral institutions, and professional, vocational, and technical schools. The missions of these schools vary tremendously, as do their resources and governing structures, but most, if not all, States share the goal of educating their citizens, in all their diversity, to assume productive roles in business, government, and society generally.

Public universities and colleges enroll the vast majority of students pursuing post-secondary education. Indeed, in 2000, they enrolled approximately 75% of post-secondary school students nationally, expending over 170 billion dollars.[2] For students of moderate means, public schools play a particularly significant role, as the average expense of attending a private undergraduate college is almost three times that of the public equivalent.[3]

To successfully fulfill their traditional role in providing higher education, States must have the freedom and flexibility to create strong institutions tailored to the needs of each particular

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1. U.S. Department of Education, National Center for Education Statistics, *Digest of Education Statistics, 2001*, Chapter 3, Table 245 at 291 (available at http://nces.ed.gov/pubsearch/pubsinfo.asp?pubid=2002130).

2. *Supra* note 1, Figure 13 at 200.

3. *Supra* note 1, at 199.

State and its citizens. In striving to meet these objectives, *Amici* States have learned, through decades of experience, that a diverse student population enriches the learning environment for all students and better prepares them to excel in a heterogenous world. The States also recognize that because of our nation's tragic history of slavery and, until just a generation ago, legal segregation, the law limits how racial classification may be used, even where intended to broaden the intellectual discourse and further the goals of equality and democracy. State colleges and universities across the nation have therefore relied for more than two decades on *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978), to understand how the Fourteenth Amendment should guide their efforts to formulate admissions policies that strengthen diversity. Many of these policies are similar to those of the University of Michigan's School of Literature, Science and the Arts and its Law School, and all reflect the type of educational judgment and expertise Respondents exercised in their admissions decisions.

The need to take race or ethnicity into account in college admissions, like the mission, goals, and student body of each institution, varies over time and requires periodic re-evaluation. Some public colleges and universities that do not currently consider race may choose to in the future, while others that consider race now may not tomorrow. The Court's decision in these cases will therefore affect the ability of *all* public higher education institutions to decide how best to achieve the educational benefits of diversity for their students and their citizens.

SUMMARY OF ARGUMENT

The court of appeals and district court decisions upholding the University of Michigan's admissions programs should be affirmed because they properly harmonize constitutional principles of equal protection, academic freedom, and traditional state sovereignty — the same balance originally struck by Justice Powell in *Bakke*, and one upon which the States have relied for almost twenty-five years.

At the outset, proper application of the Equal Protection Clause in these cases requires an understanding of its context. In exercising their freedom to determine how best to educate their citizens, many States have decided that a diverse student body, including racial and ethnic diversity, is of the utmost importance, at times requiring the consideration of race as one factor among many in a competitive admissions process. Such admissions policies must, of course, comport with the Equal Protection Clause, and a program that relies on a racial classification is thus subject to strict judicial scrutiny. But just as equal protection doctrine is sensitive to the complex interplay of forces that enter a legislature's redistricting calculus, its application in the higher education context is no less strict for taking account of complex academic judgments in an area that is, like redistricting, primarily the responsibility of the States. To accommodate these highly valued constitutional principles of academic freedom and state sovereignty, a degree of deference to the University of Michigan's determination that diversity yields educational benefits important to its educational mission, as well as to its method for attaining this diversity, is appropriate.

Second, the University of Michigan has plainly identified a compelling interest in achieving the educational benefits of a diverse student body. Its assessment that diversity will, in fact, yield educational benefits that are essential to its academic mission is one to which this Court should defer. Even under strict scrutiny, a court's role is not to require proof of a State's educational judgments, but to determine whether such a judgment is a genuinely academic one that lies within a public university's professional expertise. In any event, Petitioners have not seriously disputed that significant educational benefits are conferred by a diverse assembly of students, including students of different racial and ethnic backgrounds, and as the record establishes, these benefits are recognized by a growing consensus among leading educators, researchers and scholars.

While deferring to a public university's judgments in this way, the Court must closely scrutinize the university's goals to

determine whether they are compelling. It does so by examining whether those goals are consistent with the values of equality and free speech at the core of our Constitution and embraced within the Court's own jurisprudence — as indeed they are. As the Court has long recognized, education in an integrated setting can play a foundational role in awakening students to the cultural and democratic values of our pluralistic society, including the values of equality. Moreover, it can stimulate the "robust exchange of ideas" central to the First Amendment. Conversely, the harm that can flow from education in isolation from the individuals, institutions, and ideas that make up our heterogeneous society has long been recognized as anathema to the very notion of equality.

Third, equal protection doctrine also requires a close fit between goals and policies. But "fit" in the context of higher education is a function of many variables, including mission, selectivity, traditions, and characteristics of the applicant pool. Public universities and colleges differ widely along these lines, and "narrow tailoring" does not require a one-size-fits-all admissions system. Thus, the theoretical existence of a race-neutral alternative cannot be dispositive, especially because such alternatives are ineffectual in many settings. Rather, public universities require flexibility, within clearly-defined constitutional limits, to decide how best to achieve their diversity goals in light of the many factors that impact such complex educational policy decisions. By clarifying the limits first set forth in *Bakke*, this Court can provide "breathing space" within which universities can exercise their judgment as to how best to fulfill their academic missions.

As explained in *Bakke*, the hallmark of a constitutional plan is individualized inquiry, in which race is one of many factors, placed on the same footing for consideration as other types of diversity. Because the University of Michigan's plans comport with these parameters, they are narrowly-tailored and should be upheld.

ARGUMENT

I. EQUAL PROTECTION REVIEW OF A PUBLIC UNIVERSITY'S ADMISSIONS DECISIONS REQUIRES ACCOMMODATION OF FIRST AMENDMENT INTERESTS AND RESPECT FOR THE STATES' TRADITIONAL ROLE IN EDUCATION.

In determining whether an admissions plan comports with both the "compelling interest" and "narrow tailoring" prongs of equal protection doctrine, the Court should keep in mind that unlike in the employment and contracting settings, equal protection review in the context of public higher education implicates important principles of academic freedom in an area traditionally committed to the discretion of the States. It is well-settled that the Equal Protection Clause subjects a State's use of a racial classification to "searching judicial inquiry" to "'smoke out' illegitimate uses of race." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 226 (1995) (internal quotations omitted). But strict scrutiny does not require that a court blind itself to other, equally important, constitutional values. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 915-916 (1995). On the contrary, the "fundamental purpose" of strict scrutiny is to "take 'relevant differences' into account." *Adarand*, 515 U.S. at 228. *Bakke* itself — which has become integrated into "the fabric of our law," *Johnson v. Transp. Agency*, 480 U.S. 616, 644 (1987) (Stevens, J., concurring), as well as the fabric of our university communities, *see* Brief of the State of New Jersey as *Amicus Curiae* in support of Respondents (discussing *stare decisis* effect of *Bakke*) — harmonizes principles of equal protection, academic freedom, and federalism. It does so by giving a degree of deference to a public university's academic decisions, within constitutionally prescribed limits. In order to adequately accommodate the university's academic freedom, as well as the States' traditional role in higher education, this Court should do the same.

A. University Admissions Decisions Are a Special Concern of the First Amendment and Require Judicial Deference.

The Court has long viewed the academic freedom of our universities as a "transcendent value," the safeguarding of which is "a special concern of the First Amendment" to which "[o]ur Nation is deeply committed." *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("The essentiality of freedom in the community of American universities is almost self-evident."). Protecting a university's freedom to determine for itself "what is or is not germane to the ideas to be pursued," *Board of Regents v. Southworth*, 529 U.S. 217, 232 (2000), is of vital importance if our universities are to continue "'to provide that atmosphere which is most conducive to speculation, experiment and creation.'" *Sweezy*, 354 U.S. at 263 (Frankfurter, J., concurring). This "[a]cademic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also * * * on autonomous decisionmaking by the academy itself." *Regents of the Univ. of Mich. v. Ewing*, 474 U.S. 214, 226 n.12 (1985) (citing *Bakke*, 438 U.S. at 312 (opinion of Powell, J.)) (internal citations omitted). Indeed, the success of our nation's academic institutions is often attributed to the value we place on academic freedom: "An important reason why American higher education has become pre-eminent in the world is the greater willingness of the government to respect the autonomy of colleges and universities." William G. Bowen and Derek Bok, THE SHAPE OF THE RIVER: LONG-TERM CONSEQUENCES OF CONSIDERING RACE IN COLLEGE AND UNIVERSITY ADMISSIONS [hereinafter THE SHAPE OF THE RIVER] 287 (1998).

Included within "'the freedom of a university to make its own judgments as to education'" is "the selection of its student body." *Bakke*, 438 U.S. at 312. Restricting the States' ability to select a diverse student body runs counter to this principle by denying "one of 'the four essential freedoms' of a university," that is, "[d]iscretion to determine, on academic grounds, who

may be admitted to study." *Ewing*, 474 U.S. at 226 n.12 (quoting *Bakke*, 438 U.S. at 312). It is for this reason that judicial review of university admissions decisions "is rarely appropriate." *Ewing*, 474 U.S. at 230 (Powell, J., concurring).

Judicial restraint with respect to admissions decisions is further grounded in the Court's recognition that a university's judgment regarding admissions relies on a specialized area of knowledge. Federal courts are simply not well-suited to "evaluate the substance of the multitude of academic decisions that are made daily by faculty members of public educational institutions — decisions that require 'an expert evaluation of cumulative information and [are] not readily adapted to the procedural tools of judicial or administrative decisionmaking.'" *Ewing*, 474 U.S. at 226 (quoting *Board of Curators v. Horowitz*, 435 U.S. 78, 91 (1978)).

It is in consideration of our nation's "deep commitment" to academic freedom that a state college or university is entitled to deference in its determination that a diverse student body will lead to educational benefits essential to its mission, and in its selection of the admissions program that it believes will best serve this goal.

B. Public Education Is a Traditional State Concern.

Deference to academic judgments regarding admissions decisions is particularly appropriate for the nation's *public* colleges and universities because higher education is primarily a state concern. *See Horowitz*, 435 U.S. at 91 ("By and large, public education in our Nation is committed to the control of state and local authorities."). The States have committed substantial resources to establish institutions of higher education that both are affordable and rival this nation's private universities. Nearly twelve million students enrolled in public institutions of higher education in 2000 alone, representing 75% of post-secondary school students nationally.[4] The States thus play a vital role in the sphere of higher education, similar to their role in public education at the primary and secondary level.

4. *Supra* note 1, Figure 13 at 200.

See Brown, 347 U.S. at 493. Neither our federal system — nor academic freedom — can thrive when a public university is not accorded deference in the selection of a student body that, in its view, will best serve its mission. While the Fourteenth Amendment contemplates interference with state authority, "this Court has never held that the Amendment may be applied in complete disregard for a State's constitutional powers" but rather has recognized that the "Fourteenth Amendment does not override all principles of federalism." *Gregory v. Ashcroft*, 501 U.S. 452, 468, 469 (1991).

One of the many functions of public education at all levels is to nurture values necessary for good citizenship and the maintenance of a flourishing democracy — a quintessentially state role. "'No one should underestimate the vital role in a democracy that is played by those who guide and train our youth,'" *Keyishian*, 385 U.S. at 603 (quoting *Sweezy*, 354 U.S. at 250), as education is essential to the political health of our communities, *see Mueller v. Allen*, 463 U.S. 388, 395 (1983). Indeed, public education serves as "the very foundation of good citizenship," *Brown*, 347 U.S. at 493, and is vital to "the preservation of values on which our society rests." *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

For these reasons, decisions regarding public education are an exercise of state sovereignty that go "'to the heart of representative government,'" fulfilling "'a most fundamental obligation of government to its constituency.'" *Ambach*, 441 U.S. at 76; *see also Gregory*, 501 U.S. at 462-463 (citing *Ambach* for the proposition that public education is "'intimately related to the process of democratic self-government'"). It is thus well-established that education is a traditional state concern, *United States v. Lopez*, 514 U.S. 549, 580 (1995) (Kennedy, O'Connor, JJ., concurring), that rest[s] "firmly within a State's constitutional prerogatives" reserved by the Tenth Amendment. *Gregory*, 501 U.S. at 462-463. Just as the Court has stated that "our scrutiny will not be so demanding" when reviewing political functions such as the establishment of citizenship qualifications

for public school teachers, *id.*, it has expressed its "reluctance to trench on the prerogatives of state and local educational institutions," noting its "responsibility to safeguard their academic freedom." *Ewing*, 474 U.S. at 226; *see also Horowitz*, 435 U.S. at 91.

The admissions policies devised by the University of Michigan and the alternative approaches advocated by several *Amici* for Petitioners demonstrate how, with respect to education policy, States perform their role as "laboratories for experimentation to devise various solutions where the best solution is far from clear." *Lopez*, 514 U.S. at 581; *see San Antonio Ind. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 42-43 (1973) (noting the judiciary's "lack of specialized knowledge and expertise" in educational policy, and observing that "the judiciary is well-advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe continued * * * experimentation so vital to finding even partial solutions to educational problems"); Michael W. McConnell, *Federalism: Evaluating the Founders' Design*, 54 U. CHI. L. REV. 1484, 1498, 1507 (1987) (States have "greater opportunity and incentive to pioneer useful changes," and should retain "a high degree of decision making autonomy * * * on the humble assumption that most governmental decisions are fairly debatable–that is, there is no single compelling just answer to many questions of government."). Federal intervention that prevents States from "experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise" constitutes a significant intrusion on state sovereignty, *Lopez*, 514 U.S. at 583 — even more so when a public university is seeking to nurture an intellectual atmosphere of "'speculation, experiment and creation'" protected by the First Amendment, *Bakke*, 438 U.S. at 312 (quoting *Sweezy*, 354 U.S. at 263).

C. Harmonizing These Constitutional Principles Requires Judicial Deference to a Public University's Judgment as to How Best to Fulfill its Mission.

The arena of public education does not permit easy crossover of equal protection principles established in other contexts because public higher education implicates the important principles of academic freedom and federalism, discussed *supra*. This Court should review a public university's academic decisions with a degree of deference, while ensuring they are within constitutionally-prescribed limits. This deference is similar to that accorded electoral redistricting. Equal protection review of redistricting legislation "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. For this reason, and because redistricting is "a most difficult subject for legislatures," the Court has held that "the States must have the discretion to exercise the political judgment necessary to balance competing interests." *Id*; accord *Easley v. Cromartie*, 532 U.S. 234, 242 (2001). To allow States to exercise this judgment, the Court does not interfere in the redistricting process on a claim of racial gerrymandering unless race predominates, subordinating traditional districting principles; if race is considered as *a* factor, but not the *predominant* factor, the Court will not strictly scrutinize the legislation. *Miller*, 515 U.S. at 916; *Cromartie*, 532 U.S. at 214.

Public institutions of higher education, while subject to strict scrutiny when they rely on a racial classification, similarly must be afforded "breathing space" to make academic judgments and complex policy choices. *See Keyishian*, 385 U.S. at 604. Indeed, the scheme established in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny to protect state political prerogatives is comparable to that set forth by Justice Powell in *Bakke* to accommodate First Amendment considerations, and appropriately so. Both involve the need to balance multiple constitutional considerations in reviewing complex decisions regarding difficult matters of traditional state concern. Both therefore provide a measure of deference in reviewing such state

decisions. In *Bakke*, as in the *Shaw* line of cases, race may constitutionally be considered as one of many factors — "on the same footing" as, or not "subordinat[ing]," the others — without thereby depriving the States of the judicial deference that they are otherwise afforded in such matters. *Bakke*, 438 U.S. at 317; *Miller*, 515 U.S. at 779; *id.* at 928 (O'Connor, J., concurring).

Bakke stresses this point. As Justice Powell explained, "[u]niversities * * * may make individualized decisions, in which ethnic background plays a part, under a presumption of legality and legitimate educational purpose. So long as the university proceeds on an individualized, case-by-case basis, there is no warrant for judicial interference in the academic process." 438 U.S. at 319 n.53. If a university's admissions plan involved a competitive consideration of race as one of many factors, with individualized review as the hallmark, "good faith would be presumed in the absence of a showing to the contrary." *Bakke*, 438 U.S. at 318-319.

As discussed in Points II and III, *infra*, the Court should harmonize the various constitutional interests at play in the same manner Justice Powell did — by providing clear parameters for a constitutionally permissible plan and then giving serious weight to a public university's determination of its academic mission and how that mission is best fulfilled. This deference does not dilute the strict scrutiny analysis; it sets up certain legal boundaries within which a court may presume that consideration of race in admissions is constitutional.

II. PUBLIC UNIVERSITIES HAVE A COMPELLING INTEREST IN THE EDUCATIONAL BENEFITS OF A DIVERSE STUDENT BODY.

To satisfy strict scrutiny, the University of Michigan must show that its interest in attaining the educational benefits of a diverse student body is compelling. The University of Michigan, like many state universities, has determined that diversity confers educational benefits that are essential to its mission. While the Court must determine whether those benefits constitute a "compelling interest," the judgment that diversity yields them,

and that they are central to a school's mission, should not be second-guessed. These decisions merit deference in light of the freedom accorded the University in defining its own academic mission and its expertise in doing so, as well as the need to give the States a measure of discretion in fulfilling their traditional function of providing public education.

The goal of attaining the educational benefits of diversity is sufficiently compelling to allow consideration of race as a factor in admissions decisions. This Court has stressed the importance of a diverse educational environment. And as explained below, Petitioners' other objections — that an interest in attaining diversity is amorphous and ill-defined, and that the consideration of race as one of many factors relevant to diversity relies on impermissible stereotypes — are unavailing and misapprehend the role that race plays in the University of Michigan's admissions plans.

A. Public Universities Have Determined That Diversity Is Essential to Their Educational Missions.

The University of Michigan asserts a compelling interest in achieving the educational benefits that flow from a diverse student body — including diversity by race. While the record firmly establishes these benefits, such proof is not constitutionally required in assessing whether this asserted interest is compelling. The University of Michigan's judgment that diversity does confer critical advantages, and that they are essential to its academic mission, is the type of judgment to which a court should defer, for the reasons discussed in Point I, *supra*. Academic freedom requires that a university be given discretion in selecting its students and the values its admissions policies will promote. *See Ewing*, 474 U.S. at 225 (When asked "to review the substance of genuinely academic decisions," judges "should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.") (footnote omitted).

Additionally, where the university is a public school, federalism demands some degree of deference to the State's decisions about the values to be instilled by its educational institutions.

This approach diverges from a court's role in assessing a remedial interest, which requires "a strong basis in evidence of the harm being remedied" to assess the veracity of a state actor's assertion that remedial efforts are in fact the reason for the classification. *Miller*, 515 U.S. at 922. The different evidentiary standards stem from the divergent nature of the respective interests. The validity of a remedial interest is by its nature a question of historical fact, and thus is susceptible to evidentiary verification in a way that an educational interest grounded in the fulfillment of a public university's mission simply is not. Moreover, state institutions generally can make no claim of specialized expertise in identifying past discrimination, as they can with respect to the definition and fulfillment of their educational missions. The public university's educational interest must be articulated to permit an assessment of its compelling nature and a means-end analysis, but to require evidentiary verification of the educational benefit sought, especially where that benefit may yet be aspirational, would do serious damage to the principles of academic freedom and federalism essential to our Constitution.

In any event, the benefits of diversity in institutions of higher education are plain and well-established. The University of Michigan, like the vast majority of public colleges and universities, has determined that exposure to a diverse student body is a powerful tool by which students come to understand and appreciate similarities and differences in life experience, as well as how those similarities and differences inform beliefs and attitudes. Such exposure spurs students to tolerate and respect differences in appearance and experience, to question previously unexamined assumptions and stereotypes, and, at the same time, to truly appreciate the common ground that they share. With this teaching tool, public universities play an indispensable role in preparing students to succeed in our

heterogenous workplaces and markets and to participate fully in our pluralistic social and political institutions.

Because race remains a salient feature in American life, public universities have found that racial and ethnic diversity is a crucial component of the diversity from which these educational benefits may be derived. The record in these cases documents what is otherwise obvious — by and large, Americans of different races live in different communities, attend separate elementary and secondary schools, and rarely have sustained, meaningful contact with one another. *See* Expert Report of Thomas J. Sugrue.

Justice Powell's opinion in *Bakke* affirms the importance of a diverse student body. His concurrence recognized that a university's academic freedom includes the freedom to select its student body in such a way as to create an atmosphere of "'speculation, experiment, and creation — so essential to the quality of higher education.'" 438 U.S. at 312. More importantly, it observed that such an environment is "widely believed to be promoted by a diverse student body":

> [A] great deal of learning occurs informally * * * through interactions among students of both sexes; of different races, religions, and backgrounds; who come from cities and rural areas, from various states and countries; who have a wide variety of interests, talents, and perspectives; and who are able, directly or indirectly, to learn from their differences and to stimulate one another to reexamine even their most deeply held assumptions about themselves and their world. * * * People do not learn very much when they are surrounded only by the likes of themselves.

Id. at 312-313 n.48 (quoting Bowen, *Admissions and the Relevance of Race*, PRINCETON ALUMNI WEEKLY 7, 9 (Sept. 26, 1977)). Justice Powell also acknowledged the significant social benefits of permitting universities to use their admissions process

to obtain a diverse student body: "[T]he 'nation's future depends upon leaders trained through wide exposure' to the ideas and mores of students as diverse as this Nation of many peoples." *Id.* at 313. Even at the level of graduate education, Justice Powell added, "our tradition and experience lend support to the view that the contribution of diversity is substantial." *Id.* at 313.

Many public universities, including the University of Michigan, agree with these views and believe that consideration of race as a "plus" factor in their admissions process, in the manner approved in *Bakke*, is essential to obtain these important educational benefits.[5]

B. The Goal of Achieving the Educational Benefits of a Diverse Student Body Is Compelling.

The Court has long recognized the foundational role of education in awakening students to the cultural and democratic values of a pluralistic society, the importance of exposure to a "robust exchange of ideas" "out of a multitude of tongues," and the harm of education that takes place in isolation from the individuals, institutions, and ideas that make up our heterogenous community. Relying on this "tradition and experience," as well as fundamental principles of equal protection and academic freedom, the Court should conclude that a university's interest in diversity is compelling and therefore justifies a narrowly-tailored consideration of race. *See Bakke*, 438 U.S. at 311-312 ("[T]he attainment of a diverse student body * * * is clearly a constitutionally permissible goal for an institution of higher education."); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 286 (1986) (O'Connor, J., concurring) ("[A]lthough its precise contours are uncertain, a state interest in the promotion of racial diversity has been found sufficiently 'compelling,' at least

5. For example, institutions of the University System of Maryland consider race as one factor among many in deciding whom to admit, and the System's administration regards it as essential that this practice continue.

in the context of higher education, to support the use of racial considerations in furthering that interest.") (citing *Bakke*, 438 U.S. at 311-315).[6]

1. In the context of racially-segregated professional schools, this Court has highlighted the importance of education in a racially heterogenous environment. *See Sweatt v. Painter*, 339 U.S. 629, 634 (1950) (Legal education "cannot be effective in isolation from the individuals and institutions with which the law interacts. Few students and no one who has practiced law would choose to study in an academic vacuum, removed from the interplay of ideas and the exchange of views with which the law is concerned."); *McLaurin v. Okla. State Regents*, 339 U.S. 637, 641 (1950). The Court's First Amendment jurisprudence has similarly recognized the significance of interaction among a wide range of persons and ideas: "The Nation's future depends on leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Keyishian*, 385 U.S. at 603.

And though a state university system differs in certain respects from primary and secondary schools, this Court has also acknowledged, in the context of public school desegregation, the important educational benefits of interaction among students of different races: "Attending an ethnically diverse school may help * * * prepar[e] minority children 'for citizenship in our pluralistic society,' while, we may hope, teaching members of the racial majority 'to live in harmony and mutual respect' with children of minority heritage." *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 472-473 (1982) (internal citations omitted); *see also id.* at 472 ("[W]hite as well as Negro children benefit from exposure to 'ethnic and

6. The United States, as well, through its Title VI guidance, has long recognized and advised the States that a university's interest in educational diversity is compelling. *See* 59 Fed. Reg. 8756, 8760-8761 (Feb. 23, 1994) (supplementing 44 Fed. Reg. 58509 (Oct. 10, 1979)).

racial diversity in the classroom.'"); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) (school authorities have the discretion to determine that a racially diverse student body is necessary "to prepare students to live in a pluralistic society"); *North Carolina State Bd. of Educ. v. Swann*, 402 U.S. 43, 45 (1971) (same); *see also Ambach*, 441 U.S. at 77 (public schools bring together "diverse and conflicting elements in our society" "on a broad but common ground").

2. While Petitioners claim otherwise (Briefs for the Petitioners in No. 02-241, at 22, 31-33; No. 02-516, at 39-41), an interest in attaining a diverse student body is sufficiently "specific" and "verifiable" to permit consideration of race. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 613 (1990) (O'Connor, J., dissenting). The interest in educational diversity "is not an interest in simple ethnic diversity." *Bakke*, 438 U.S. at 315. "The diversity that furthers a compelling state interest encompasses a far broader array of qualifications and characteristics of which racial or ethnic origin is but a single though important element." *Id.* The race of an applicant may be considered, but it is not decisive when compared to the contribution to educational pluralism that may be made by another candidate. When racial diversity is considered on the same footing as the other pertinent elements of diversity in this way, a university does not rely on race in substantial disregard of the school's other admissions criteria. Those other elements of diversity thus provide "a crucial frame of reference" against which any consideration of race to achieve educational diversity can be compared, and therefore "constitute a significant governing principle." *Miller*, 515 U.S. at 928 (O'Connor, J., concurring).

By the same token, while the Equal Protection Clause requires close judicial scrutiny when a state actor uses a racial classification, it does not demand that racial diversity be treated as *less important* than other constituent elements of a diverse student body. Race is an important component of a diverse student body, and to consider factors such as age, geographic

origin, and socioeconomic status, while barring consideration of race, would treat a State's efforts to achieve racial diversity *less* favorably than similar efforts to achieve other forms of diversity. *Cf. Seattle Sch. Dist.*, 458 U.S. 457 (state-wide initiative permitting busing for nonracial reasons but forbidding it for racial reasons violates equal protection); *Lee v. Nyquist*, 318 F. Supp. 710 (W.D.N.Y. 1970) (statute treating educational matters involving racial criteria differently from other educational matters and making it more difficult to deal with racial imbalance in the public schools violates equal protection), *aff'd mem.*, 402 U.S. 935 (1971); *Hunter v. Erickson*, 393 U.S. 385 (1969) (city charter treating racial housing matters differently from other housing matters violates equal protection).

3. Moreover, contrary to Petitioners' claim (Briefs for the Petitioners in No. 02-241, at 43-44; No. 02-516, at 17-18, 29-30), considering race as permitted in *Bakke* does not rely on stereotypes, as it does not assume that persons of a certain race or ethnicity will share particular views or beliefs. The educational value of diversity does not depend on the false assumption that all members of one race think alike or share the same views. Rather, education in a diverse environment enables students to discover the falsity of such stereotypes.

Just as geographic diversity exposes students to the range of experiences associated with growing up in different places, ethnic and racial diversity exposes students to the range of experiences attendant to living as a racial or ethnic minority. In treating race and rural upbringing, for example, as relevant in the competitive admissions process, the university admissions officer cannot know precisely how living in a rural area has shaped one student's beliefs or how the fact that a student self-identifies and is perceived as African-American has shaped another's. And indeed, the admissions officer need not know, because the pursuit of racial and ethnic diversity relies not on the belief that members of the same race share the same beliefs or behavior, but on the indisputable social fact that race and ethnicity can significantly affect life experience — just as socio-

economic status and geographic origin can significantly affect life experience. This Court has reached a similar insight in discussing the requirement that juries be drawn from a fair cross section of society. *See Peters v. Kiff*, 407 U.S. 493, 503-504 (1972) (plurality opinion) (The exclusion from jury service of any "large and identifiable segment of the community" removes "varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude * * * that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance."); *Ballard v. United States*, 329 U.S. 187, 193-194 (1946) (A community made up exclusively of one sex "is different from a community composed of both; the subtle interplay of influence one on the other is among the imponderables. To insulate the courtroom from either may not in a given case make an iota of difference. Yet a flavor, a distinct quality is lost if either sex is excluded.") (footnote omitted).

III. AN ADMISSIONS PROGRAM THAT PROVIDES FOR INDIVIDUALIZED, WEIGHTED CONSIDERATION OF RACE IS NARROWLY TAILORED.

Having established that the goal of diversity is compelling, the University of Michigan must also demonstrate — as it has — that its means are narrowly tailored to accomplish this objective. Petitioners ask this Court to hold otherwise, contending that the challenged programs fail the narrow-tailoring test set forth in *Bakke* and subsequent decisions, in particular *United States v. Paradise*.[7] While an admissions program such as the University's, modeled after the "Harvard plan" referenced in *Bakke*, satisfies the principles animating *Paradise*, Petitioners'

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7. In *Paradise*, the Court relied upon several factors to assess the constitutionality of a remedial race-conscious employee promotion plan, including: the necessity for the relief and the efficacy of alternative remedies; the flexibility and duration of the relief; the appropriateness of the numerical goals; and the impact on the rights of third parties. 480 U.S. 149, 171 (1987).

reflexive application of *Paradise* ignores significant differences between the context of that case — involving employment — and this one. Where the provision of public education is at stake, courts should accord universities a degree of deference about the manner in which they consider race, as discussed in Point I, *supra*. In any event, the University of Michigan's plans are narrowly tailored under either formulation.

In attempting to refute this conclusion, several *Amici* for Petitioners claim that any consideration of race is impermissible given the existence of alternative diversity plans at several undergraduate institutions. That argument, however, unduly restricts the States' discretion in providing public education and also ignores the limited efficacy of such plans. Most universities share a goal of diversity. But due to differences in their educational missions, histories, geographic locations, and the characteristics of their applicant pools, they rely upon a wide variety of factors, at times including race, to attain that goal. The choice of which factors to consider and how much weight should be accorded to them is quintessentially an academic judgment, tailored to each university's unique needs. An admissions system that produces diversity at a flagship state university located in a metropolitan area in Florida may fail to produce diversity at a liberal arts college in a small town in Iowa or an upstate New York community college located in a rural county. Simply put, there is not and cannot be a single "right" way to achieve diversity in university student populations nationwide. If diversity is viewed as a compelling interest, universities must have the flexibility to choose the means best suited to their goals. Narrow tailoring does not demand a universal admissions system.

The University of Michigan's admissions programs fit comfortably within the parameters set forth in *Bakke* and thus should be upheld. These plans consider race as a factor, but not the predominant factor, and individually assess each applicant. They do not set quotas or unduly burden non-minority students. Permitting the States to employ such plans would assure a close fit between ends and means, while creating a sphere within which States

are free to select the admissions systems that best serve their mission. This result would ensure that equal protection is accorded all of the University's students, without nullifying the additional constitutional interests in academic freedom and federalism.

A. The Mere Existence of Alternatives for Achieving Diversity Does Not Preclude a University from Establishing That a Race-conscious Admissions Program Is Narrowly Tailored to Achieve its Diversity Goals.

Perhaps the most significant of the *Paradise* factors is the efficacy of alternative approaches. Indeed, Justice Powell characterized this as the "secondary meaning" of the term "narrowly tailored," *Wygant*, 476 U.S. at 280 n.6 (plurality opinion), and it has proven dispositive in several cases, including *Bakke*. Several *Amici* supporting Petitioners assert that the admissions programs at the University of Michigan cannot survive strict scrutiny because other assertedly race-neutral alternatives exist for achieving diversity in university student populations. These include the "percentage" plans instituted in Texas, Florida and California, which guarantee admission to a state university to graduates of secondary schools who finish in the top "x" percent of their class.

However, the theoretical availability of such alternatives does not preclude a university from establishing that its admissions program is narrowly tailored. The crucial determination is whether those alternatives are effective and would provide a more precise "fit" to a particular university's goals than an admissions program that considers an applicant's race as one of many factors. *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality opinion). "Fit" is a function of many variables, including the selectivity of the university, its traditions, mission and priorities, and the characteristics of its applicant pool. No two universities have all of these variables exactly in common, and no single type of admissions program will therefore produce satisfactory results for every institution of higher education. Thus, the existence of these programs

cannot be grounds for holding the University of Michigan's programs unconstitutional.

1. The record here contains ample evidence that the University of Michigan considered alternatives to the admissions programs it ultimately adopted and assessed whether, in light of its applicant pool and academic standards, those alternatives would effectively produce a diverse student body. *See* Briefs of Respondents in Nos. 02-244; 02-516. A state official's good faith selection of an admissions program that considers race as one factor among many, in the manner endorsed by *Bakke*, should be upheld. *See Bakke*, 438 U.S. at 318-319. Courts should not require universities to experiment with an alternative approach just because it has been newly implemented in another State. As the court below noted in *Grutter v. Bollinger*, courts are "ill-equipped to ascertain which race-neutral alternatives merit which degree of consideration or which alternatives will allow an institution such as the Law School to assemble both a highly qualified and richly diverse academic class." 288 F.3d 732, 751 (6th Cir. 2002) (citing *Ewing*, 474 U.S. at 226).

2. In any event, the percentage plans touted by *Amici* in support of Petitioners are not the panacea the *Amici* make them out to be. As a preliminary matter, the percentage plans — instituted in California, Texas, and Florida — do not apply to those States' graduate and professional schools, and thus have no relevance whatsoever to the law school case currently before the Court. In fact, in those States, where consideration of race in admissions has been banned by voter initiative (California), executive order (Florida), and court ruling (Texas), graduate and professional schools have witnessed a significant drop in minority enrollments. The studies suggest that race-neutral alternative policies may be particularly ineffective in producing diversity at the graduate and professional school level. *See* Linda F. Wightman, *The Threat to Diversity in Legal Education: An Empirical Analysis of the Consequences of Abandoning Race as a Factor in Law School Admission Decisions*, 72 N.Y.U. L. Rev. 1, 39-50 (1997).

At the University of California's law schools, for example, the number of applicants, admissions and new registrants from the underrepresented minority groups decreased after affirmative action was banned, as did the representation of those groups as a percentage of the entire student body. The effect on African Americans was most severe. In 1995-96, before the ban, 7.2% of admittees to UC law schools were African American. By 1997-98, after the ban, that figure had dropped to 2.2%, and by the Fall of 2001, it had reached only 4%.[8]

In Texas, enrollment of African Americans and Hispanics at the University of Texas Law School, the premier public law school in the State, has significantly declined since the ban was imposed. In 1996-97, before the ban, African Americans were 6.4% of total enrolled students. In the following years, that figure dropped to 4.7%, 2.9%, and 1.2%, and stood at 2.3% in 2000-2001. Hispanics were 11.8% of total enrolled students in 1996-97, but only 10.2%, 8.9%, 8.3% and 9.0% in each subsequent year. During this time period, total minority enrollment dropped from 24.7% to 17.2%.[9]

In Florida, after race-conscious admissions to graduate and professional schools were prohibited effective for Fall 2001 admissions, enrollment of minorities at certain schools dropped dramatically. For example, at the University of Florida Levin College of Law, minority enrollment dropped from 33.8% in 1999-2000 to 22.9% in 2001-2002,[10] and the Dean of the Law School has admitted that even that lower figure could not have been attained without crucial reliance on minority scholarships, *see* Jon Mills, *Diversity in Law Schools*:

8. U.S. Civil Rights Commission, Beyond Percentage Plans: The Challenge of Equal Opportunity in Higher Education [hereinafter U.S. Civil Rights Commission], Nov. 2002, Chapter 2, Table 2.6 and Figure 2.3 (available at <http://www.usccr.gov/pubs/percent2/main.htm); *Chilling Admissions: The Affirmative Action Crisis and the Search for Alternatives* (Gary Orfield & Edward Miller, eds., 1998), at 43-45.

9. U.S. Civil Rights Commission, *supra* note 8, at Table 2.10.

10. U.S. Civil Rights Commission, *supra* note 8, at Table 2.16.

Where Are We Headed in the Twenty-First Century?, 33 U. TOL. L. REV. 119, 129 (2001).

3. Even at the undergraduate level, percentage plans are not a viable alternative for most States. They fundamentally alter the standards of academic achievement relied upon by many selective universities by requiring universities to prioritize class rank over all else. Doing so can force schools to admit students from weaker schools over better-prepared students from stronger schools.

Moreover, percentage plans have not been effective in maintaining diversity at the most selective flagship schools, especially in light of the rising percentage of underrepresented minorities in the population.[11] The selective citation of statistics by *Amici* supporting Petitioners masks this fact. For example, the statistic cited by the United States with respect to California focuses on the state-wide university system and ignores the effect California's percentage plan has had on individual campuses. *See* Brief for the United States as *Amicus Curiae* Supporting Petitioners in No. 02-241, at 17. At one of the California system's more selective universities, UC-Berkeley, the African American and Hispanic admissions figure stood at 24.1% in 1997, when race was considered. In 1998, after Proposition 209, the figure dropped precipitously to 11.7%, and has risen only slightly in subsequent years (13.9% in 1999; 16.0% in 2000; and 16.6%

11. *See* Catherine L. Horn and Stella M. Flores, *Percent Plans in College Admissions: A Comparative Analysis of Three States' Experiences* [hereinafter Horn and Flores], Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/tristate.pdf); Patricia Marin and Edgar K. Lee, *Appearance and Reality in the Sunshine State: The Talented 20 Program in Florida* [hereinafter Marin and Lee], Feb. 5, 2003 (available at http://www.civilrightsproject.harvard.edu/research/affirmativeaction/florida.pdf); Marta Tienda, *et al.*, *Closing the Gap?: Admissions & Enrollments at the Texas Public Flagships Before and After Affirmative Action* [hereinafter Tienda], Jan. 21, 2003, at 1 (available at <http://www.texastop10.princeton.edu/publications/tienda012103.pdf).

in 2001, since the percentage plan was put into effect).[12] Enrollment statistics show the same pattern. Enrollment of Hispanics and African Americans at UC-Berkeley dropped from 22.4% in 1997 to 11.7% in 1998, and remains low (13.8% in 1999; 13.9% in 2000; and 14.7% in 2001).[13] Notably, in California in 2000, African Americans and Hispanics constituted 46% of the population aged 15-19, and 40% of the high school graduating classes that year.[14]

In addition, percentage plans by themselves apparently have only a minimal effect on diversity; any positive results appear attributable to minority-targeted financial aid, support services, and recruitment to sustain minority enrollment.[15] In relying on race, particularly race-targeted financial aid, such plans cannot fairly be considered a "race-neutral" alternative.

Moreover, percentage plans can succeed only in the presence of a very particular combination of demographic factors and segregation indices. The minority population in a State must be sufficiently large, as it is in Texas, California and Florida, and clustered in large areas rather than dispersed throughout the State. If it is, and a significant number of racially-segregated high schools result, admitting the top percentage of high school graduates could, in theory, lead to the enrollment of a number of minority students. However, where high schools are integrated, a percentage plan would very likely pass over well-qualified minority students. *See* Jack Greenberg, *Affirmative Action in Higher Education: Confronting the Condition and Theory*, 43 B.C. L. REV. 521, 546 (2002). Many States believe a college admissions program that depends on a high degree of segregation for its success is in tension with efforts to

12. Horn and Flores, *supra* note 11, Table 18 at 40.

13. Horn and Flores, *supra* note 11, Table 29 at 49.

14. Horn and Flores, *supra* note 11, Table 2 at 26; Table 5 at 28.

15. *See* Marin and Lee, *supra* note 11, at v, 37; Horn and Flores, *supra* note 11, at vii-viii, 51-59; Tienda, *supra* note 11, at Abstract, 37.

desegregate their elementary and secondary schools, a view that should not be lightly disregarded.

4. Finally, although percentage and other plans that use a proxy for race can be race-neutral on their face, if the primary motivation behind their implementation is the desire to maintain or increase minority enrollment relative to non-minorities and if that goal is achieved, States implementing such plans may still be subject to constitutional attack. *See* Brian T. Fitzpatrick, *Strict Scrutiny of Facially Race-Neutral State Action and the Texas Ten Percent Plan*, 53 BAYLOR L. REV. 289 (2001); *cf.* Jeffrey Selingo, *What States Aren't Saying About the "X-Percent Solution,"* CHRON. OF HIGHER EDUC., June 2, 2000, at A31 (reporting that "[a]ides to Gov. Jeb Bush of Florida admit they settled on a 20-percent standard after computer models of 10-percent and 15-percent policies failed to produce enough black and Hispanic students").

B. An Admissions Plan That Considers Race as a Factor and Does Not Set Quotas or Insulate Any Student from Competition Is Constitutional.

If a university considers alternatives and concludes that an admissions program that considers race as one factor among many will most effectively achieve diversity, the pertinent inquiry becomes the constitutionally permissible contours of that program. In this respect, *Bakke* provides useful guidance. In *Bakke*, Justice Powell pointed with approval to the admissions programs at Harvard College and Princeton, which provided for individualized, weighted consideration of each applicant's qualifications, including race and ethnic background. *See* 438 U.S. at 318 (an individual whose qualifications were weighed fairly and competitively under such a program "would have no basis to complain of unequal treatment under the Fourteenth Amendment"); *id* at 320 (Brennan, White, Marshall, and Blackmun, J.J., concurring in part) (agreeing that "a properly devised admissions program involving the competitive consideration of race and ethnic origin" would be constitutional); *see also* 44 Fed. Reg. at 58510. Many universities, including

the University of Michigan, modeled their admissions programs after these plans. The *Amici* States contend that such admissions programs, which require individualized review and consider race as one of many factors, satisfy *Bakke* and *Paradise*.

1. Perhaps most importantly, the Michigan and Harvard plans are flexible and have a logical stopping point. The admissions process begins anew each school term, at which point a school can re-evaluate the need to consider race. And while the interest in diversity, unlike a remedial interest, is itself timeless, the need to consider race to achieve that goal is not. As the court below found in *Grutter*, "[t]he record indicates that the Law School intends to consider race and ethnicity to achieve a diverse and robust student body only until it becomes possible to enroll a 'critical mass' of under-represented minority students through race-neutral means." 288 F.3d at 752.

Moreover, the Michigan admissions plans utilize a single admissions system with a single review committee and a consistent set of admission criteria. Applicants are neither excluded from consideration on a systemic basis nor grouped together for consideration. Admissions personnel individually review each file, and consider a wide variety of diversity-enhancing characteristics, such as socioeconomic status, athletic talent, geographic factors, alumni relationships, personal achievement, age, leadership and service skills, and writing skills. Race does not predominate over the other factors, as academic criteria and an applicant's other contributions to diversity will frequently eclipse race. Such a system ensures that applicants have an opportunity to compete for all available seats and are not insulated or protected from competition.

2. The Michigan admissions plans do not use quotas or reserve a pre-determined number of seats for applicants of any particular race. This is not to say, however, that it is impermissible to pay any attention to the number of minority applicants who are ultimately offered admission. Genuine diversity cannot be achieved by the admission of token numbers

of minority groups. As the Harvard Plan endorsed in *Bakke* explains:

> [T]he Committee is aware that if Harvard College is to provide a truly heterog[e]neous environment that reflects the rich diversity of the United States, it cannot be provided without some attention to numbers. It would not make sense, for example, to have 10 or 20 students out of 1,100 whose homes are west of the Mississippi. Comparably, 10 or 20 black students could not begin to bring to their classmates and to each other the variety of points of view, backgrounds and experiences of blacks in the United States. Their small numbers might also create a sense of isolation among the black students themselves and thus make it more difficult for them to develop and achieve their potential. Consequently, when making its decisions, the Committee on Admissions is aware that there is some relationship between numbers and achieving the benefits to be derived from a diverse student body, and between numbers and providing a reasonable environment for those students admitted.

438 U.S. at 323.

Contrary to the arguments made by Petitioners and several of their *Amici*, the endeavor to enroll a "critical mass" of underrepresented minorities does not transform Michigan's admissions policies into quota systems. This Court has recognized a clear distinction between lawful goals and prohibited quotas. *See Johnson*, 480 U.S. at 641 (holding that affirmative hiring plan that considers sex as one of many factors is not a quota where its numerical goals are adjusted annually and it does not earmark positions for anyone).

Nor is it inappropriate for university officials to assign a fixed weight to each diversity factor, including race, or to assign more weight to race than to some other factors. *See* 44 Fed. Reg. at 58510. Justice Powell acknowledged as much in stating,

"the weight attributed to a particular quality may vary from year to year depending upon the 'mix' both of the student body and the applicants for the incoming class." *Bakke*, 438 U.S. at 317-318. The informality of a plan like Harvard's, which does not assign numerical weights to each factor, is simply not feasible in a large public institution, operating on a limited budget, where the need for fairness and consistency in individually reviewing a large number of applications requires a degree of standardization. A rigid rule forbidding the assignment of particular weights to diversity factors would deny large public universities the flexibility to adopt a Harvard-like plan, and deny its students the benefits of a diverse education. *Cf. Wygant*, 476 U.S. at 280 n.6 (narrow tailoring does not require prohibitive administrative expense).

3. Finally, a race-conscious admissions system like the Harvard and Michigan plans does not unduly burden non-minority students. The effect of such plans is "diffused to a considerable extent among society generally." *Wygant*, 476 U.S. at 282. Indeed, several empirical studies have shown that an admissions program that uses race as a "plus" factor has only a slight impact on a particular non-minority applicant's odds of admission to a selective university, in the range of 1-2%. *See* Goodwin Liu, *The Causation Fallacy: Bakke and the Basic Arithmetic of Selective Admissions*, 100 MICH. L. REV. 1045, 1072-1078 (2002); THE SHAPE OF THE RIVER, *supra*, 36-37.

In sum, the *Amici* States contend that there can be no one right way to achieve genuine diversity in university student populations. Universities' educational missions, applicant pools, and diversity goals differ, and the law must be sufficiently flexible to allow for the implementation of different types of admissions programs. We urge the Court to hold that an admissions program like the Harvard and Michigan programs — one that provides for competitive, individualized consideration of applicants' qualifications and characteristics, including race to some degree but not predominantly — is constitutionally permissible.

CONCLUSION

For the reasons stated, the judgments of the United States Court of Appeals for the Sixth Circuit and the United States District Court for the Eastern District of Michigan upholding the constitutionality of the University of Michigan's admissions programs should be affirmed.

Respectfully submitted,

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